Supreme Court of the United States

OCTOBER TERM, 1940.

No. 524

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship IDEFJORD, her engines, etc.,

Petitioner,

against

BLUMENTHAL IMPORT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Summary Statement of the Matters Involved.

Petitioner, Den Norske Amerikalinje A/S, a corporation, respectfully shows:

1. Petitioner asks that this Court review the decision of the Circuit Court of Appeals for the Second Circuit in a cause in admiralty, brought *in rem* against the steamship Idefjord, principally upon the ground that the decision sought to be reviewed,* which reversed that of the District Court, is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit and of decisions of state courts of last resort (*infra,* pp. 5-8, 11-18).

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* Reported below, 114 Fed. (2d) 262, reversing 31 Fed. Supp. 667.

2. The cause was tried in the first instance in the United States District Court, Southern District of New York, which court entered a decree of dismissal (R. p. 294). The District Court made findings of fact (R. p. 294 and pp. 282-288) which were accepted by the Circuit Court of Appeals (R. pp. 306-307). A summary of these findings of fact is:

3. In December, 1936 and January, 1937, Blumenthal Import Corporation (respondent herein and libelant below) contracted to purchase 321 bales of wool from one Zariffa, a wool exporter in Cairo, Egypt. The contracts of sale were on a C. & F basis (R. p. 282).

4. In order to dispatch the bales in question to the United States, Zariffa delivered them to the firm of D. C. Pitellos & Co., at Alexandria, Egypt, which issued five so-called bills of lading, all in the same form, between January 26, 1937 and February 19, 1937 (R. pp. 282, 225-233). These so-called bills of lading provided that the wool would be carried from Alexandria, Egypt, to Port Said and there transshipped "by first available opportunity," subject to all of the terms and conditions in the bills of lading in use by "the on-carrying line of steamers" (R. p. 283), and, further, "subject to the conditions and exceptions of the carrying conveyance." (Next to last paragraph of Libelant's Exhibits E-1 to E-5 reproduced between pages 224 and 233, also the opinion of the Circuit Court of Appeals [R. p. 306].)

5. After the wool had arrived at Port Said, concern developed because of the lack of any ships which could carry the goods forward under deck (R. p. 283), no under-deck space being available on any vessel for several months (R. pp. 60-61).

6. Negotiations then took place between the Port Said and Suez Coal Company, who were agents of the time charterers of the Idefjord, and Stapledon & Sons, in whose

possession the wool was, for the carriage of the wool on the deck of the Idefjord from Port Said to Casablanca, and then under deck for the transatlantic voyage, Stapledon & Sons notifying the Port Said & Suez Coal Co. that they had the shippers' consent for on-deck shipment as far as Casablanca, provided the wool was then stowed below deck (R. p. 284).

Zariffa was notified of the necessity of deck shipment up to Casablanca and on February 27th Zariffa wrote to the Blumenthal Import Corporation that the wool had been loaded on deck "only up to Casablanca * * *. In view of the lack of space on steamers *I found it preferable to ship in this way,* particularly as the 'deck' will only be for part of the Mediterranean, which is a calm sea especially at this period" (R. p. 286). (Italics ours.)

7. On February 27th the wool was loaded upon the Idefjord (R. p. 285). The contract under which the Idefjord received the bales was evidenced by the letters of Stapledon & Sons and Port Said & Suez Coal Co., the ship's manifest, the mate's receipts and the bills of lading made out by the Port Said & Suez Coal Company, all of which provided for shipment "on deck at shippers' risk to Casablanca only where goods must be placed (or restowed) in hold" (R. pp. 284-285).

8. The wool was well and securely stowed on the ship's deck, aft of the bridge, and rested on barrels, and on the hatch, which raised the bottom of the lowest bales a distance of 3 feet or more from the deck itself, the bales being covered with tarpaulins (R. p. 285).

9. Some days after sailing from Port Said, and while proceeding in the Mediterranean bound for Casablanca, the Idefjord encountered excessive rains, heavy seas and westerly gales (R. p. 286), and on arrival at Casablanca on March 12th it was found that the deck cargo had become

to some extent wet from the rain and spray and some of it was heating (R. p. 286). The wool was accordingly left at Casablanca to be reconditioned (R. p. 286).

The District Court held that the determinative factor in the case was whether the master of the Idefjord had the right to accept the goods for "on deck" stowage (R. p. 288). Summarizing the situation at Port Said, the District Court said (R. pp. 288-289):

> "Here the initial carrier [D. C. Pitelkes & Co.] undertook, as is evidenced by the through bill of lading, to deliver the merchandise to its ultimate destination, all parties concerned contemplating that there would be transshipment. We then find Stapledon and Sons in possession of the goods at the point of transshipment with a duty to transship. The captain of the 'Idefjord' and the Port Said and Suez Coal Company informed them of the fact that there was no room below deck on the 'Idefjord'. Stapledon and Sons, the captain of the 'Idefjord' and the Port Said and Suez Coal Company then contracted, as appears clearly from all the papers evidencing the transaction, that the goods would be carried by the 'Idefjord' 'on deck at shippers' risk.' We think, on these facts, the only fair measure of the second carrier's liability is its own contract with Stapledon and Sons."

10. With reference to the contention that the master of the Idefjord should have known that the acceptance of the goods for "on deck" carriage was unreasonable and hence that he should have declined to carry them, the District Court said (R. pp. 292-293):

> "Innumerable factors enter into the reasonableness of such manner of carriage, most of which the captain could not know and should not be required to know. There was an obligation of the shipper to avoid unnecessary delay. There was a fluctuating market. There was the cost and danger of further storage at Port Said. There was the uncertainty of obtaining another ship to carry the wool. Any

one of these or other easily imagined considerations might well have made (in their view) reasonable and advantageous with all its risk. We think, therefore, that the carrier, recognizing the risk, had a right to contract with the person in possession of the goods, irrespective of their nature, relying upon that person's determination of the reasonableness, under the circumstances, of such a contract and that person's authority to make any contract which would be reasonable and was not conclusively known to be otherwise. This latter is true, especially where, as here, the person in possession affirmatively represents that he has such authority and the carrier has no positive knowledge to the contrary. *The Caledonia*, 50 Fed. (2d) [illegible]. The contract so made determines the rights and duties of the carrier."

11. The Circuit Court of Appeals held that there was only one substantial issue in the case, saying (R. pp. 311-312):

> "The only substantial issue remaining in the case, as we view it, concerns the privilege of the Idefjord to agree with Stapledon & Son for on-deck carriage, in view of the outstanding Alexandria bills of lading."

The Circuit Court of Appeals proceeded to hold that the Idefjord had no such "privilege" on the ground that it had made the issuer of the Alexandria bills of lading its agent, and "could not then accept the goods under its own conditions" (R. p. 312).

12. Petitioner submits that the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *The St. Hubert*, 107 Fed. 727; certiorari denied by this Court, 181 U. S. 621.

13. In *The St. Hubert*, *supra*, goods had been shipped at Calcutta for delivery at Philadelphia with transshipment

at London, on the steamer of an independent auxiliary carrier, as in the case at bar. The question before the Court was whether this independent auxiliary carrier was bound by the bills of lading originally issued or was entitled to make its own contract with the initial carriers. The Circuit Court of Appeals for the Third Circuit held that an independent auxiliary carrier could be held liable only in accordance with its own contract and was not bound by the terms of the through bill of lading. The legal principle is thus stated by the Circuit Court of Appeals for the Third Circuit (107 Fed. at pp. 732-733):

> "In performing that service, however, it was necessary, and, as we have said, so understood by the parties to the contract, that a new and independent carrier from London to Philadelphia would have to be employed by the original carriers. The contract with such new carrier was a bilateral one, to which Cooper, Smith & Co. were not parties, though interested as consignees, to whom delivery was owing by the new carrier under the terms of its independent contract with the old carriers. Such new carrier was not in any way bound by the terms or stipulations of the through bills of lading, unless as they were expressly adopted by it as applicable to the particular service in which it was engaging.
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> "Another view of the situation of the parties from its legal standpoint is that one who contracts, on a through bill of lading, to carry goods from one port to another, is responsible to the owner or consignee for the entire service between the two ports, whether in his own ships or in those procured by him to enable or assist him to perform his contract. Such assistance from other and independent carriers may be necessary to the fulfillment of his undertaking under his through bill of lading. It is not required that he, or the independent auxiliary carrier, should invoke the authority of agency, express or implied, from the shipper or owners, to sanction such procurement; as it can be referred to the free choice of means open to the signers of the through bill of

lading, with which the shipper or consignee has no right to interfere. The latter may hold the through carrier to a strict fulfillment of his contract with them, but neither of them is on that account a party to such auxiliary contracts. In the exercise of this freedom of contract the engagement between the original and new carrier is, of course, subject to those duties and requirements which are imposed and exacted by the maritime law, but in all other respects the independent contract of the two carriers must be taken to govern the transportation service thereby undertaken. Its reasonable conditions and exemptions are as much a part thereof, and are as binding, as the main stipulation of carriage and affreightment. If the terms are more favorable to such new carrier than those contained in the through bill of lading, the owner, if he suffer thereby, must look for redress under that original contract. In the language of the court below:

> 'To say that the first bill of lading binds the second carrier is to require him to submit to a contract concerning which he was not consulted, and to which he did not agree.'"

14. The Circuit Court of Appeals for the Second Circuit refused to follow this well-settled rule, saying (R. p. 312):

> "And though it is claimed that the ship's liability in a suit in rem is measured by the contract of her master, and not by an antecedent agreement with third persons, not the agents of the ship, yet the Idefjord, by accepting the cargo for carriage with knowledge of the clean through bills, *made the issuer of those bills its agent. It could not then accept the goods under its own conditions,* and it was bound in rem for right delivery." (Italics ours.)

The above is in flat contradiction of the decision in *The St. Hubert, supra.*

Jurisdiction.

15. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, Title 28, U. S. C., Sec. 347(a).

The opinion of the Circuit Court of Appeals is dated August 9, 1940 (R. p. 305). Within the time allowed by the Rules of the Circuit Court of Appeals a petition for rehearing was filed, which was denied on September 10, 1940 (R. p. 319), and on September 11, 1940, the order of reversal and for mandate of the Circuit Court of Appeals was filed (R. p. 320).

Question Presented.

16. The question presented is whether it was correctly decided in *The St. Hubert, supra,* that the vessel of an independent auxiliary carrier is not liable *in rem* for damage to cargo transshipped thereon, if exempted from liability by the contract under which the independent auxiliary carrier has received the goods, or whether, as held in the case at bar, an independent auxiliary carrier is not entitled to "accept the goods under its own conditions."

Reasons Relied on for the Allowance of the Writ.

17. Petitioner asks that this Court should issue its writ of certiorari and reverse the decision of the Circuit Court of Appeals and reinstate the decision of the District Court for the Southern District of New York for the following reasons:

(a) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in conflict with the decision of the Circuit Court of Appeals for the Third

Circuit, as mentioned *supra,* pages 5-7, and as will be pointed out more at length *infra,* pages 11-18. If the decision of the Court of Appeals for the Second Circuit in the case at bar stands, great confusion will result because that decision is not only at variance with the decision of the Circuit Court of Appeals for the Third Circuit in *The St. Hubert, supra,* but is also at variance with decisions in a number of other jurisdictions (pp. 14-16, *infra*). The outcome of litigation will thus depend upon the forum in which it is prosecuted.

(b) The decision sought to be reviewed involves a most important question of commercial law which ought to be ruled upon by this Court. In the development of maritime commerce, transshipment of cargo has become very common. The Circuit Court of Appeals in the case at bar holds that an independent auxiliary carrier may accept the goods only in accordance with the terms of the bill of lading initially issued. An independent auxiliary carrier therefore will, in many instances, be forced to refuse to on-carry because unable to comply with the conditions of the bill of lading initially issued. It is not in accord with the interests of commerce that goods should be delayed for indefinite periods at ports of transshipment, suffering deterioration and incurring charges, because no independent auxiliary carrier will accept them. The rule as stated in *The St. Hubert, supra,* page 5, offers a proper solution of the problem, but that rule is rejected by the Circuit Court of Appeals for the Second Circuit in the case at bar.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court, for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings

in this cause, which is numbered and entitled on the docket of the Circuit Court of Appeals as "No. 397, October Term, 1939, Blumenthal Import Corporation, Libelant-Appellant, against Steamship Idefjord, her engines, etc., Den Norske Amerikalinje A/S, Claimant-Appellee"; that the decree of the United States Circuit Court of Appeals for the Second Circuit in the said case may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may seem just.

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